

BEAR COAL CO. INC.

IBLA 94-133

Decided June 25, 1996

Appeal from a decision of the Associate Director for Policy and Management Improvement, Minerals Management Service, denying an appeal of the assessment of late payment charges on coal royalty payments. MMS-90-0410-MIN.

Affirmed.

1. Coal Leases and Permits: Royalties—Payments: Generally

Under 43 CFR 3451.2(e) (1985), the obligation to pay readjusted coal royalties when due was suspended pending the outcome of an appeal of the readjustment. However, that regulation also provided that royalties accrued under the readjusted rate during the pendency of the appeal, and, if the rate were upheld on appeal, those royalties were payable, with interest.

2. Coal Leases and Permits: Royalties—Payments: Generally

The Minerals Management Service is authorized under 30 CFR 218.202 and 43 CFR 3599.1 to impose a late payment charge where royalty payments for coal mined by underground operations from Federal coal leases are untimely or improper. The imposition of late payment charges is appropriate to compensate the Government for loss of use of funds due but not paid.

APPEARANCES: Brian E. McGee, Esq., Denver, Colorado, for appellant; Howard W. Chalker, Esq., Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Bear Coal Company, Inc. (Bear), has appealed from a June 19, 1993, decision of the Associate Director for Policy and Management Improvement, Minerals Management Service (MMS), denying its appeal of a March 16, 1990, assessment by the Chief, Payor Accounting Branch, Royalty Compliance Program, MMS, of late payment charges in the amount of \$131,936.32 for the late payment of royalties on underground coal production from Federal coal lease Nos. D-052501 and C-42481 for the sales months of August 1985 through June 1989.

The Bureau of Land Management (BLM) issued lease No. D-052501 on August 20, 1945, to George W. Edwards. Anchor Coal Company, Inc. (Anchor), is the present lessee of lease No. D-052501. Bear is Anchor's sublessee. BLM issued lease No. C-0117192 on June 1, 1965, to a predecessor of Atlantic Richfield Company (ARCO). By assignment approved effective December 1, 1985, Bear acquired from ARCO part of lease No. C-0117192, now identified as lease No. C-42481. Bear is the operator of the Bear Coal mine complex on lease Nos. D-052501, C-42481, and other lands.

At the time the leases were issued, royalty rates were calculated on a fixed cents-per-ton basis and the leases were subject to readjustment at 20-year intervals. By decision dated February 28, 1985, BLM proposed terms and conditions for the readjustment of lease No. D-052501, including a change in the royalty from \$0.20 per ton of coal to 8 percent of the value of coal mined by underground operations. By decision of August 21, 1985, BLM overruled lessee Anchor's objections to the proposed lease readjustment terms. Anchor appealed, and the Board affirmed BLM's decision in part, and set aside and remanded it in part. Anchor Coal Co., IBLA 87-9 Order (Aug. 2, 1988). While the Board upheld the decision to adjust the lease royalty rate, it set aside the imposition of the 8-percent royalty rate for coal removed by underground operations and remanded the case to BLM to "undertake the necessary review and determine whether conditions warrant a royalty rate of less than 8 percent, but not less than 5 percent" (Order at 7).

In a similar appeal of a BLM decision imposing readjustment terms in the case of lease No. C-0117192, the Board also set aside BLM's imposition of an 8-percent royalty for coal removed by underground operations and remanded the case to BLM for the same type of review directed in the Anchor Coal order. Atlantic Richfield Co. (On Reconsideration), IBLA 86-211 Order (Aug. 30, 1988).

By decision dated July 26, 1989, BLM established the royalty rate for coal removed by underground operations on lease No. D-052501 at 5 percent of value, effective August 20, 1985, the anniversary date of the lease. On the same date, it issued a notice to Bear stating that, in accordance with revised 43 CFR 3451.2(e) (53 FR 37300 (Sept. 26, 1988)), all readjusted terms and conditions, including royalty rates, were effective on the lease anniversary date, and requesting payment of the royalty at the readjusted rate within 30 days of receipt of the notice. Similarly, by decision dated September 15, 1989, BLM set the royalty rate for lease No. C-42481 at 5 percent of the value of coal removed by underground operations "from December 1, 1985, the effective date of the partial assignment, to June 1, 1995, the date the lease next becomes subject to readjustment."

On December 12, 1989, MMS received a check from Bear in the amount of \$219,952.17, and on December 14, 1989, a transfer of a cash bond in the amount of \$590,000, for a total of \$809,952.17, representing the difference between \$0.20 per ton and 5 percent of the value of coal removed by underground operations for the period August 1, 1985, through June 30, 1989.

On March 16, 1990, the Chief, MMS Payor Accounting Branch, issued a late payment assessment accompanied by a 48-page bill for collection (No. 01000508) tabulating late payment assessments, totalling \$131,936.32, issued under MMS' "automated exception processing system." The Chief explained that the late payment interest exceptions were "generated by comparing when a payor paid royalties and other charges to when [MMS] system expected the payments." The Chief advised Bear that, under 30 CFR 218.202 (1989), "late-payment assessments represent those exceptions in which your payment was received at MMS after the transaction due date."

In its appeal of that assessment, Bear contended that a final royalty rate was not established until Bear received BLM's July 26, 1989, decision adjusting the royalty rate to 5 percent, and the due date of such payment was 30 days from Bear's receipt of the accompanying notice.

MMS prepared a "field report" summarizing Bear's arguments and its own position. The field report states at page 2 that Bear's royalty payments for August 1985 through June 1989 were due by September 30, 1985, through July 31, 1989, but the payments were not received until December 12 and 14, 1989, 134 to 1,534 days late. The field report stated in part at page 3, as follows:

Because the leases in question were issued prior to August 4, 1976, and the coal removed was from an underground mine, BLM readjusted the leases and established a royalty rate of 8 percent. The leases were subject to readjustment and by law and regulation the minimum royalty rate was 5 percent. [Bear] could have remitted royalties at the minimum rate of 5 percent but instead chose to pay royalties based upon 20 cents per ton. [Bear] did not pay royalties at greater than 20 cents per ton until after the settlement of its appeal to BLM and then to IBLA * * *.

[Bear] could have prevented this late-payment assessment by complying with the readjustment laws and regulations and by paying royalties at the 5 percent rate. The late payment assessment that is under appeal was calculated based upon [Bear's] reporting at a 5 percent royalty rate.

In her June 19, 1993, decision, the Associate Director rejected Bear's contention that a percentage royalty rate did not become effective until 30 days following Bear's receipt of BLM's July 26 and September 15, 1989, decisions setting the royalty rate at 5 percent for each of the leases. She stated that Bear's objections to, or appeals of, royalty rates would have the effect of "delaying the due date of royalty payments" (Decision at 3). She cited 43 CFR 3451.2(e) (1983), which provided:

The readjusted lease terms and conditions shall be effective pending the outcome of the appeal, unless the authorized officer provides otherwise. Upon the filing of an appeal, the obligation to pay royalties and rentals when due under the readjusted lease

shall be suspended pending the outcome of the appeal. However, during the pendency of the appeal, royalties and rentals shall accrue under the readjusted lease terms and shall be payable if the decision is upheld on appeal, plus interest at the rate specified for late payments in 43 CFR Part 3480.

She then found that, in accordance with 30 CFR 218.202 (1992) and 43 CFR 3599.1 (1992), covering late payment or underpayment charges, 1/ MMS was obligated to assess late payment charges for royalties not timely received.

On appeal to the Board, Bear raises essentially the same arguments presented below. It asserts that because the 8-percent royalty rate was set aside by action of this Board "the only then current royalty rate for the Subject Leases was 20 cents per ton, which Bear Coal Co. had been consistently remitting to the MMS" (Statement of Reasons (SOR) at 7). That rate, Bear argues, was in effect until BLM's decisions of July 26 and September 15, 1989, imposed the 5-percent royalty rate.

In an alternative argument, Bear contends that issuance of a demand for payment is a condition precedent to the establishment of a due date for payment and the assertion of a late payment claim. Bear asserts that the earliest due date for which it could be assessed late charges for lease No. D-52501 was August 27, 1989, 30 days from its receipt of MMS' July 26 notice. Bear claims that MMS never issued a notice demanding payment for lease No. C-42481, thus, no due date was established for that lease.

Next, Bear asserts that its payment in December 1989 of the difference between the \$0.20 cents per ton and the 5 percent underground coal royalty rate was not fixed until July 26 and September 15, 1989. Accordingly, Bear argues that its payment did not constitute a late payment under 30 CFR 218.202.

Finally, Bear contends that to the extent 30 CFR 218.202 is asserted to govern the facts in this case, its "promulgation and/or [its] application" in this case "must be held to violate the arbitrary and capricious standard of administrative review" (SOR at 10).

Discussing the regulatory background, MMS points out that, under 43 CFR 3451.2(e), royalties continued to accrue under the readjusted lease terms and conditions during the pendency of the appeals of BLM's decisions and those royalties were payable with interest, when the decisions were

1/ 30 CFR 218.202(a) specifies that MMS will collect the "full amount past due plus a late payment charge" where a lessee has failed to make "timely or proper payment of any monies due pursuant to leases and contracts." 30 CFR 218.202(b) provides for the assessment of late payment charges "from the date that the payment was due until the date that the payment was received." The regulation at 43 CFR 3599.1 contains similar language.

upheld on appeal. It states that on September 26, 1988, the Department revised 43 CFR 3451.2(e) to provide that, regardless of whether an appeal were filed, all readjusted lease terms, including the royalty rate, were effective on the lease anniversary date. 53 FR 37300 (Sept. 26, 1988).

It also notes that the preamble to that rulemaking (53 FR 37298 (Sept. 26, 1988)) explained that royalty was due and payable as of the effective date of readjustment and that, under 30 CFR 218.202, late payment charges are to be assessed from the date that the payment was due.

MMS asserts that under the plain terms of the regulatory language, late payment charges began to accrue on the date royalty, at the readjusted rate, became due. Herein, it contends, the due dates for royalties were the dates established by BLM's 1989 decisions.

[1, 2] The regulations control the disposition of this case. At the time of lease readjustment in 1985, 43 CFR 3451.2(e) stated that the obligation to pay royalty when due was suspended pending the outcome of an appeal of the readjustment. However, it also expressly provided that royalties accrued under the readjusted lease terms and were payable, with interest, if upheld on appeal. In this case, at the time of readjustment of the leases in 1985 the regulations also provided at 43 CFR 3473.3-2(a)(3) (1985): "A lease shall require payment of royalty of not less than 8 percent of the value of the coal removed from an underground mine, except that the authorized officer may determine a lesser amount, but in no case less than 5 percent if conditions warrant." ^{2/}

When the Board issued its orders in 1988, it upheld BLM's determination to adjust the royalty rate for coal mined by underground methods. The only issue regarding royalty left undecided was the exact percentage that should be required. In accordance with 43 CFR 3473.3-2(a)(3), the Board directed that BLM undertake a review to consider whether a rate less than 8 percent, but in no case, less than 5 percent would be appropriate. Thus, under 43 CFR 3451.2(e), during the pendency of the appeals, royalties at the readjusted rate of 8 percent, with interest, had been accruing. With issuance of the Board's orders, the specific percentage royalty rate became uncertain, but Bear clearly knew that it could not be less than 5 percent for either lease. Nevertheless, Bear continued to underpay royalty at the preredjusted rate of \$0.20 cents per ton of coal mined by underground methods.

Bear's argument that the 5-percent rate was not in place until BLM issued its decisions setting such rate would have the effect of allowing individual appeals or the administrative process to determine due dates

^{2/} The Department amended 43 CFR 3473.3-2(a)(3), effective Feb. 26, 1990 (55 FR 2664 (Jan. 26, 1990)), to remove the authority to allow a lesser royalty. The pertinent provision, now found at 43 CFR 3473.3-2(a)(2), reads: "A lease shall require payment of a royalty of 8 percent of the value of coal removed from an underground mine."

for royalties due the United States. The regulations dictate otherwise. Royalties accrued at the readjusted royalty rate, with interest, during the pendency of the appeals.

By paying at the \$0.20-per ton rate from August 1, 1985, through June 30, 1989, Bear underpaid royalties due and owing throughout that period. Bear's underpayment of royalties ended in December 1989 with its remittance of \$809,952.17, representing the differential between \$0.20 per ton and 5 percent for the period August 1, 1985, through June 30, 1989. Bear's late payment entitled the Government to interest, i.e., compensation for the delay in payment. See Atlantic Richfield Co., 21 IBLA 98, 113, 82 I.D. 316, 323 (1975). The Board has recognized that the imposition of late payment charges is appropriate to compensate for the loss of use of funds due but not paid. Peabody Coal Co., 72 IBLA 337, 348 (1983). A late payment charge was properly assessed in this case pursuant to 30 CFR 218.202(a) and (b) and 43 CFR 3599.1. See Cyprus Western Coal Co., 103 IBLA 278, 282 (1988).

Bear's assertion that the due date for underpayments is the date of demand and that any such underpayments are subject to late payment charges only as of the due date must be rejected. The plain language of 30 CFR 218.202(b) requires that late payment charges begin to accrue on the date the royalty is due.

Bear's contention that the promulgation and/or application of 30 CFR 218.202 to the facts of this case is arbitrary and capricious is lacking in merit. This Board has held that it has the authority to determine in the context of deciding an appeal whether a regulation is duly promulgated. Alamo Ranch Co., 135 IBLA 61, 66 (1996); Garland Coal & Mining Co., 52 IBLA 60, 72, 88 I.D. 24, 30 (1981). Bear has failed to provide any evidence that 30 CFR 218.202 is not a duly promulgated regulation. The Secretary and his delegates are bound by duly promulgated regulations and they cannot be disregarded. Wexpro Co., 122 IBLA 1, 4 (1991); ANR Production Co., 118 IBLA 338, 343 (1991). MMS properly applied 30 CFR 218.202 in this case.

Bear's other arguments, to the extent not discussed herein, have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Franklin D. Amess
Administrative Judge

